Office-Supreme Court, U.S.
FILED
JUN 27 1985
ALEXANDER L. STEVAS,
CLERK

(5) (5)

Nos. 84-1493 & 84-1509

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

SEATTLE-FIRST NATIONAL BANK,
Petitioner,

v.

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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June 27, 1985

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This amicus curiae brief for the National Right to Work Legal Defense Foundation ("Foundation") is filed with the written consent of all parties. Sup. Ct. R. 36.2. It supports the position of petitioners that the decision of the court of appeals, reviewing unfavorably an order of the National Labor Relations Board, should be reversed.

INTEREST OF THE AMICUS CURIAE

The Foundation is a charitable, legal aid organization formed to protect the right to work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. The Foundation has aided or received requests for assistance from many non-union employees who, as a result of affiliation elections held by their local exclusive bargaining representative, have been compelled to associate unwillingly with national or international labor organizations to which they are opposed. The decision of the court of appeals in this case would deny to such employees the right to vote in those critical elections. The Foundation submits this brief to ensure that the Court has the views of that class of persons whose freedom of association and economic livelihood will be directly and adversely affected if the court of appeals' decision is not reversed.

SUMMARY OF ARGUMENT

The decision of a certified bargaining representative to affiliate with a national or international labor organization is a matter which directly affects the rights and economic interests of all employees in the bargaining unit, union and non-union alike, because of the pervasive power given to the union by the National Labor Relations Act ("the Act" or "NLRA"), 29 U.S.C. §§ 151-69 (1982), through the statutory principle of exclusive representation. The Act's overriding policy is one of employee free choice in organizing for purposes of collective bargaining.

Therefore, all bargaining unit employees, not just union members, must be afforded an opportunity to vote on such an affiliation before the newly affiliated union can claim the privilege of continued recognition as the employees' exclusive bargaining agent. This conclusion is not only consistent with the Act, but is required to avoid a conflict between exclusive representation and the constitutional guarantees of due process of law and freedom of association.

ARGUMENT

I. A Bargaining Representative's Decision to Affiliate Is Not an Internal Union Matter Because of the Pervasive Nature of the Power of Exclusive Representation

The underpinning of the opinion of the majority of the Ninth Circuit panel is the belief that the decision of a certified bargaining representative to affiliate with a national or international labor organization is an "internal" union matter. *See Financial Institution Employees, Local 1182 v. NLRB*, 752 F.2d 356, 362-64 & nn.9-10 (9th Cir. 1984)(2-1 decision), *cert. granted*, 53 U.S.L.W. 3807 (U.S. May 13, 1985) (Nos. 84-1493, -1509). That assumption ignores the nature of the statutorily created power of exclusive representation and its pervasive effect upon the rights and economic well-being of non-union employees represented by the union.

Once a labor organization has been designated as their representative by the majority of the employees in a bargaining unit, the NLRA makes that union the exclusive

bargaining agent for all employees in the unit, union and non-union alike. 29 U.S.C. § 159(a). The Act

> extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. * * * [O]nly the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them.

NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 180 (1967) (footnotes omitted). In addition, the Act authorizes the majority union to negotiate agreements requiring non-union employees to support financially its performance of the duties of an exclusive representative. 29 U.S.C. §§ 157, 158(a)(3); *see Ellis v. Railway Clerks*, 104 S. Ct. 1883, 1892 (1984).

In short, exclusive representation puts the economic life of the non-union employee at the mercy of the majority union: "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents * * * ." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944). Through compulsory unionism agreements, those "legislative" powers include even the ultimate power of taxation.

In these circumstances, it is disingenuous to say that

the affiliation of a local bargaining representative with a national or international union is merely an internal union matter which does not directly affect all employees in the bargaining unit. Through that affiliation the non-union employee, at the least, is unwillingly associated with, and required to accept the bargaining policies of, an organization with which he may disagree for economic or ideological reasons. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977). If the union negotiates a compulsory unionism agreement, then he also will be required to subsidize the institutional activities of the national or international, such as social affairs, publications, and conventions. *See Ellis*, 104 S. Ct. at 1896-97. Perhaps worst of all, if his health or pension plan is administered by the union, and it chooses to affiliate with a national or international that has been infiltrated by organized crime, his medical benefits or the security of his retirement years may be jeopardized. *See, e.g., Brown v. Hotel & Restaurant Employees Local 54*, 104 S. Ct. 3179 (1984); Roukis & Charnov, *The RICO Statute: Implications for Organized Labor,* 36 Lab. L.J. 281, 285-87 (1985); *Union Corruption Worse Than Ever*, U.S. News & World Rep., Sept. 8, 1980, at 33.

II. The Act's Most Fundamental Policy is Employee Freedom of Association, Not Stability in the Bargaining Representative

The second major leg of the Ninth Circuit majority's decision is the assertion that a "policy of maintaining stability in the bargaining representative" is more important to achieving the Act's purpose of promoting "industrial peace" than is employee freedom of choice. *See*

Financial Institution Employees, 752 F.2d at 364-66. The fallacy in that argument is that it relies on a so-called "policy" extrapolated by the Ninth Circuit majority from rules adopted in other contexts by the National Labor Relations Board ("Board"), *see id.* at 365-66, while employee freedom of choice is explicitly guaranteed by the Act itself.

"It is indisputable that the thrust of the NLRA is not the protection of the union, not the protection of the employer, but rather the protection of the employee." *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 442 (5th Cir. 1978). The Act does not foster union representation *per se*, but guarantees employees the right to self-determination as to union representation.

Senator Wagner, architect of the original Act, said that whatever controversy there might be with regard to other aspects of federal labor policy, "there is practically unanimous agreement in Congress * * * that the right of employees to organize and bargain collectively through representatives *of their own choosing* should be safeguarded *at all times.*" 79 Cong. Rec. 7568 (1935) (emphasis added). Consequently, the congressional declaration of policy in the Act established the protection of employee freedom of association as a fundamental purpose of the statute:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions * * * *by protecting the exercise by workers of full freedom of association*, self-organization, and designation of

> *representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

NLRA, ch. 372, § 1, 48 Stat. 449, 449-50(1935) (codified as amended at 29 U.S.C. § 151) (emphasis added).

That basic policy of protecting employee self-determination has been implemented in the operative provisions of the Act since its enactment. Section 7 guarantees individual employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through *representatives of their own choosing* * * * ." *Id.* § 7, 49 Stat. at 452 (codified as amended at 29 U.S.C. § 157)(emphasis added). Section 9(a) states that "[r]epresentatives designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit" shall be the exclusive representative of all employees in that unit. *Id.* § 9(a), 49 Stat. at 453 (codified as amended at 29 U.S.C. § 159(a)) (emphasis added). And, the Act's unfair labor practice provisions, set out in section 8, 29 U.S.C. § 158, as Senator Wagner said, "are intended to make the worker a free man, to decide for himself whether he wants an organization, and if he wants one, what the type of that organization should be." 75 Cong. Rec. 7574 (1935).

Then, in 1947 Congress responded to concerns that individual employees were not adequately protected in their relations with labor organizations by amending section 7 to provide expressly that employees "shall also have the right to refrain from any or all of [the] activities" in which the original Act guaranteed them a right to participate. Labor Management Relations Act, ch.

120, § 101, 61 Stat. 136, 140 (1947); *see id.* § 1(b), 61 Stat. at 136 (codified at 29 U.S.C. § 141(b)). Congressman Hartley, the House sponsor and floor manager of the 1947 bill, stated at the outset of the debate in the House that the *first* right which the bill guarantees to the workingman is "[t]he right to join with the fellow workers to select a collective-bargaining agent of their own choosing, that is to say, one that is not forced upon them * * * ." 93 Cong. Rec. 3425 (1947).

This Court too, from the beginning, has viewed protection of employee self-determination in the selection of a bargaining agent as *the* overriding purpose of the Act. Shortly after the Act was passed, the Court said, "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining *is often an essential condition of industrial peace.*" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1936) (emphasis added). As the Court explained in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956), the two declared policies of the Act, to preserve a competitive business economy and to protect the rights of labor to organize, "depend for their foundation upon assurance of 'full freedom of association.' *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining 'the normal flow of commerce and . . . the full production of articles and commodities . . . .'" *See Hill v. Florida ex rel. Watson*, 325 U.S. 538, 541-42 (1945).

In this case, the Board has held that a certified bargaining representative must afford all bargaining unit

employees, not just union members, an opportunity to vote on its affiliation with a national or international labor organization, before the newly affiliated union can claim the privilege of continued recognition as the employees' exclusive representative. Although the Ninth Circuit majority would have it otherwise, the statutory language, legislative history, and decisions of this Court demonstrate that "[t]he Board's position is rooted in the generally prevailing statutory policy that a union should not purport to act as the collective-bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit." *NLRB v. Iron Workers Local 103*, 434 U.S. 335, 344 (1978).*

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* In *Iron Workers Local 103*, the Court also said:

> "There could be no clearer abridgment of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity" than to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority."

434 U.S. at 344 (quoting *Ladies' Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961)). The Board's decision in *North Electric Co.*, 165 N.L.R.B. 942 (1967) (3-2 decision), cited in the Ninth Circuit majority opinion in this case, 752 F.2d at 361 n.7, graphically demonstrates that not allowing non-members to vote in an affiliation election can result in the certification of a union selected by a minority of the employees in a bargaining unit. In *North Electric* an independent union defeated the Allied Industrial Workers of America ("AIW") by an 84 to 80 vote in a Board-conducted election. At a union meeting held approximately 15 months later, the independent adopted a motion to affiliate with the AIW by a vote of 52 to 2. There were 288 employees in the unit, 50 of whom were not union members and could not vote at the union meeting. The Board majority certified the newly affiliated AIW local as the exclusive representative, despite the fact that more employees (84) had voted against the AIW in the Board-conducted election than the number (52) who voted for it on the affiliation motion. 165 N.L.R.B. at 942-43.

III. Constitutional Considerations Require That Non-Union Employees Be Given an Opportunity To Vote in Their Exclusive Representative's Affiliation Election

The provisions of the NLRA for exclusive representation are comparable to those of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1982). *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). In the *Steele* case, the Court was faced with arguments that exclusive representation is unconstitutional under the fifth amendment to the Constitution of the United States, because it deprives the minority of employees in a bargaining unit of liberty and property without due process of law. *See Steele*, 323 U.S. at 198-99 (opinion of the Court); *id.* at 208 (Murphy, J., concurring). Similar arguments had been successful in earlier cases in which the Court struck down the exclusive representation provisions of other Depression-era legislation. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (opinion of the Court); *id.* at 318 (Hughes, C.J., concurring); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

The Court avoided the constitutional questions in *Steele* by interpreting the RLA as "impos[ing] on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." 323 U.S. at 202-03. This duty of fair representation is imposed on unions under the NLRA as well as the RLA. *Ford Motor Co.*, 345 U.S. at 336-38. Wherever necessary to the end of fair representation, "the union is required to consider requests of non-

union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of an opportunity for hearing upon its proposed action." *Steele*, 323 U.S. at 204.

If considerations of constitutional due process require that non-union employees be given an opportunity to participate in the process of collective bargaining, *a fortiori*, those same considerations mandate that non-members be allowed to participate in a vote which will determine the very identity of their government-certified bargaining representative. It is no answer to say, as did the majority of the Ninth Circuit panel in *Financial Institution Employees*, 752 F.2d at 363 n.10, that "non-union members interested in an affiliation decision are free to join the union." That would compel the employee to give up his right to refrain from union membership, a right guaranteed by the first amendment to the United States Constitution as well as by section 7 of the Act. *See Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3252 (1984); *Abood*, 431 U.S. at 234-35.

This Court has made it clear on statutory grounds that "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 278 (1973). In light of the problems that a contrary conclusion would present under the due process clause and the first amendment, that principle must apply in the case of a referendum held by a certified bargaining representative to determine whether it will affiliate with a national or international labor organization.

CONCLUSION

In holding that it will not enforce continued recognition of a newly affiliated union as an exclusive bargaining representative where all bargaining unit employees were not permitted to participate in the affiliation decision, the Board correctly applied the statutory and constitutional principles of individual free choice and due process of law. The judgment of the Ninth Circuit should be reversed and the Board's order reinstated.

Respectfully submitted,

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